



TTAB

03-04-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #71

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Kevin T. McCarney, dba Poquito Mas,

Opposer,

v.

Una Mas, Inc.,

Applicant.

Opposition Nos. 107,026
and 107,748

CERTIFICATE OF MAILING

I hereby certify that this correspondence, including listed
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FEE, Assistant Commissioner for Trademarks, 2900
Crystal Drive, Arlington, VA 22202-3513

Date:

3-1-02

Signed:

Christine P. Peters

Christine P. Peters

Attn.: TTAB -- No Fee
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

**APPLICANTS SURREPLY TO OPPOSER'S REPLY
TO THEIR MOTION TO STRIKE APPLICANT'S RESPONSES
TO OPPOSER'S FIRST REQUEST FOR ADMISSIONS**

Applicant Una Mas, Inc. hereby files this surreply to Opposer, Kevin T. McCarney's Reply Brief to correct a glaring misstatement made in Opposer's Reply Brief. In response to Applicant's assertion that Opposer's discovery requests were not properly served because they were served while these proceedings were suspended, Opposer alleges, for the first time in its Reply Brief, that there was a "mutual agreement that these proceedings should be continued." See, Reply to Applicant's Memorandum in Opposition, p. 1. Opposer, however, has not introduced any evidence of the "mutual agreement." Instead, Opposer appears to infer an agreement from Applicant's service of discovery requests on Opposer while this proceeding was suspended.

Applicant denies there was any express or implied "mutual agreement." Declaration of David J. Brezner, ¶ 2. The lack of any mutual agreement is further highlighted by Applicant's

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letter to Opposer, stating that Opposer's Discovery Requests in question were not timely and required no response, as they were served while the proceeding was suspended. Brezner Dec. ¶3; Declaration of Christine Peters in Support of Applicant's Memorandum in Opposition of Opposer's Motion to Strike, ¶3. Opposer was therefore clearly aware of Applicant's position that Opposer's discovery requests were not properly served, but failed to respond to Applicant's correspondence. Brezner Dec. ¶ 3. The fact that Opposer voluntarily chose to respond to Applicant's discovery requests did not create any mutual obligation on Applicant to do the same.

CONCLUSION

Thus, for the above reasons, Applicant requests that this Board deny Opposer's MOTION TO STRIKE APPLICANT'S UNTIMELY RESPONSES TO OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSIONS, on the grounds that Opposer's discovery requests were improperly served, and therefore Applicant's responses were not untimely.

Respectfully submitted,

FLEHR HOHBACH TEST
ALBRITTON & HERBERT LLP

Date: 3/1/02

By David J. Brezner
David J. Brezner
Attorney for Applicant

Four Embarcadero Center, Suite 3400
San Francisco, CA 94111
(415) 781-1989

CERTIFICATE OF SERVICE BY MAIL

I, Christine P. Peters, certify and declare as follows:

I am over the age of 18, and not a party to this action. My business address is Flehr Hohbach Test Albritton & Herbert LLP, Four Embarcadero Center, Suite 3400, San Francisco, California 94111.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 1, 2002, at my place of business at San Francisco, California, a copy of the following document:

**APPLICANT'S SURREPLY TO OPPOSER'S REPLY TO THEIR MOTION TO
STRIKE APPLICANT'S RESPONSES TO OPPOSER'S FIRST REQUEST FOR
ADMISSIONS**

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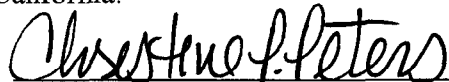
Robert V. Vickers
Vickers, Daniels & Young
50 Public Square, Suite 2000
Cleveland, OH 44113

Attorney for Opposer

and such envelope was placed for collection and mailing on March 1, 2002 following ordinary business practices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 1, 2002 at San Francisco, California.



Christine P. Peters

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Signed:

Christine P. Peters

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Arlington, VA 22202-3513

**DECLARATION OF DAVID J. BREZNER
IN SUPPORT OF APPLICANTS SURREPLY TO OPPOSER'S REPLY TO THEIR
MOTION TO STRIKE APPLICANT'S RESPONSES TO OPPOSER'S
REQUEST FOR ADMISSIONS**

1. I am an attorney admitted to practice before the United States Patent and Trademark Office. I am a partner with the law firm of Flehr Hohbach Test Albritton & Herbert LLP, counsel of record for Applicant Una Mas, Inc. in this action. Except as otherwise noted, I make this declaration of my own personal knowledge. If called as a witness, I could and would testify competently to the facts set forth herein. I submit this declaration in support of Applicant's Opposition to Opposer's Motion to Strike Applicant's Responses to Opposer's Request for Admissions.

2. I have reviewed OPPOSER'S REPLY TO APPLICANT'S MEMORANDUM IN

OPPOSITION TO OPPOSER'S MOTION TO STRIKE APPLICANT'S RESPONSES TO
OPPOSER'S REQUEST FOR ADMISSIONS. I am not aware of any express or implied

"mutual agreement that these proceedings should be continued" that existed between Opposer and
Applicant while this proceeding was suspended, as alleged by Opposer.


3. After receiving Opposer's discovery requests served on June 1, 1998, I wrote a
letter to Opposer's counsel on June 22, 1998, which stated that Opposer's discovery requests were
not timely served and therefore required no response. I did not receive any reply from Opposer in
response to my June 22, 1998 letter.

The undersigned being warned that willful false statements and the like are punishable by
fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and
the like may jeopardize the validity of the application or document or any registration resulting
therefrom, declares that all statements made of his/her own knowledge are true; and all statements
made on information and belief are believed to be true.

Respectfully submitted,

FLEHR HOHBACH TEST
ALBRITTON & HERBERT LLP

Dated: 3/1/02

By 
David J. Brezner

Four Embarcadero Center
Suite 3400
San Francisco, CA 94111
(415) 781-1989
1076372

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Christine P. Peters